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May 5, 2022

To: The Nepal Supreme Court

Regarding: Expert Opinion Statement in the case of *Rukshana Kapali v Government Nepal et al.*

I am senior researcher on lesbian, gay, bisexual, and transgender (LGBT) rights at Human Rights Watch. Over the past 10 years, I have researched and written extensively on the issue of legal recognition for transgender people around the world. I have also specifically focused a significant amount of my work on the situation in Nepal, having spent the 2011-2012 academic year as a Fulbright Scholar in Kathmandu working under the advisement of Prof. Chaitanya Mishra at Tribhuvan University. I have published extensively on issues of gender and sexuality in Nepal, including in peer-reviewed academic journals. A full list of my publications is attached to this expert witness statement as an appendix.

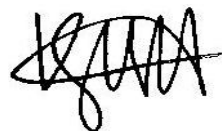
Human Rights Watch is an international non-government organization that monitors and reports on the human rights situation in 100 countries around the world, including Nepal.

In this submission, please find:

1. The expert opinion by Kyle Knight, senior researcher on LGBT rights.
2. A list of Kyle Knight's relevant publications.

I hereby present the attached expert statement on the case (9 pages).

Sincerely,



Kyle Knight  
Senior LGBT Rights Researcher  
for Human Rights Watch  
kyle.knight@hrw.org



HRW.org



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## 1. Expert Witness Statement

### *Nepal's Leadership on Legal Gender Recognition*

The petitioner, Rukshana Kapali, has illustrated to the court the daily indignities and fundamental rights violations she experiences because of the government's failure to recognize her gender identity as Female on official documents.

Scholars of international law and scholars of Nepal have noted that the Supreme Court's 2007 judgment in *Pant v. Nepal*, which ordered the government to establish legal gender recognition on the basis of "self-feeling," was a groundbreaking and monumental historical achievement.<sup>1</sup> At that time, legal recognition of gender identity around the world was a nascent issue and only a few governments had policies, virtually none of which accepted someone's self-identification as the criterion for recognition; the Nepal Supreme Court's influence on jurisprudence around the world was profound. Within weeks of the Court's judgment Richard Bennett, the representative of the Office of the High Commissioner for Human Rights in Nepal, called the judgment "truly a ground-breaking decision on gender identity and sexual orientation in South Asia and perhaps worldwide."<sup>2</sup> Courts around the world took the order seriously. For example, courts in the United States<sup>3</sup> and India<sup>4</sup>, as well as the European Court of Human Rights,<sup>5</sup> have cited *Pant v. Nepal (2007)* in their consideration of appropriate comparative law regarding how to recognize transgender people's rights.

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<sup>1</sup> Ryan Thoreson, "Queering Human Rights: The Yogyakarta Principles and the Norm that Dare not Speak Its Name," 2009, *Journal of Human Rights* 8(4): 323–339; David Gellner, "Masters of hybridity: how activists reconstructed Nepali society," *Journal of the Royal Anthropological Institute*, 2019, (N.S.)25,265–284.

<sup>2</sup> United Nations Office of the High Commissioner for Human Rights (UNOHCHR). 2008. Statement by Richard Bennett, Representative of the United Nations High Commissioner for Human Rights in Nepal at a Discussion Program on the Supreme Court Decision on Sexual Minority Organized by Blue Diamond Society, 12 January, Kathmandu.  
[http://nepal.ohchr.org/en/resources/Documents/English/statements/HCR/Year2008/2008\\_01\\_12\\_SexualMinorities\\_E.pdf](http://nepal.ohchr.org/en/resources/Documents/English/statements/HCR/Year2008/2008_01_12_SexualMinorities_E.pdf).

<sup>3</sup> *Zzyym v. Pompeo*, No. 18-1453 (10th Cir. 2020), <https://cases.justia.com/federal/appellate-courts/ca10/18-1453/18-1453-2020-05-12.pdf?ts=1589313701>.

<sup>4</sup> *National Legal Services Authority (NALSA) v. Union of India and Others*, WRIT PETITION (CIVIL) NO.400 OF 2012, <https://translaw.clpr.org.in/wp-content/uploads/2018/09/Nalsa.pdf>.

<sup>5</sup> *HÄMÄLÄINEN v. FINLAND*, Application no. 37359/09.



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Following the 2007 judgment, implementation of the Court's order demonstrated its strengths and weaknesses, and the need for further adjudication.

As noted in the petition before this court, some Nepali entities have adopted and implemented the third gender category (a third gender identity, marked as "Third Gender," "Other," or "Sexual and Gender Minority"). These include the Election Commission<sup>6</sup> and the Central Bureau of Statistics.<sup>7</sup> However implementation has been piecemeal and, in some cases such as the national census, insufficient – with transgender people being denied inclusion due to an unclear definition of the third gender category, and some of them identifying as Male or Female and not Third Gender. Thus, as outlined below, the Court in *Pant v. Nepal* (2007) and subsequent cases, including *Pant v. Nepal* (2017), made significant strides in recognizing the rights of transgender people. Nonetheless implementation has shown, as in this case of *Kapali v. Nepal* before the Court, that the system needs additional updates.

The lack of a coherent, consistent, transparent, and rights-based legal gender recognition procedure in Nepal falls short of the government's obligations under international human rights law. Those transgender individuals who identify as Male or Female are not provided the legal right to do so, as those who identify as third gender are provided. The current situation, in which some people are able to avail themselves of documents that align with their gender identity, and others are not, merits rectification by the Court.

As the United Nations Independent Expert on Sexual Orientation and Gender Identity noted in his 2018 report to the UN General Assembly:

In 2007, the Supreme Court of Nepal required that the Government recognize a third gender based on self-determination and without medical requirements.... It remains, however, focused solely on a third gender

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<sup>6</sup> The Carter Center, "The Carter Center's Information Sessions on the Election Commission of Nepal's Voter Registration with Photograph Program," May 9, 2012, [https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/democracy/nepal-regional-sessions-voter-registration-050912-eng.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/nepal-regional-sessions-voter-registration-050912-eng.pdf).

<sup>7</sup> Kyle Knight, "What We Can Learn From Nepal's Inclusion of 'Third Gender' on Its 2011 Census," *The New Republic*, July 18, 2011, <https://newrepublic.com/article/92076/nepal-census-third-gender-lgbt-sunil-pant>.



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identity, with no option for trans women to be recognized as female or trans men to be recognized as male.<sup>8</sup>

### ***Self-Identification***

The Court's definition of third gender in *Pant v. Nepal* (2007) situated it as a minority encompassing a broad range of identities. However, the court did make clear that the sole criterion for being legally recognized as third gender was based on individual "self-feeling."<sup>9</sup>

This drew from and is consistent with Yogyakarta Principle 3, which holds that states must,

Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex—including birth certificates, passports, electoral records and other documents—reflect the person's profound self-defined gender identity.<sup>10</sup>

As the Court noted subsequently in *Pant v. Nepal* (2017),

"[T]o say that citizenship certificates, which were obtained based on the biological organ while one's sexual identity was not yet known, cannot be amended to include their actual gender identity is tantamount to refusing to accept the existence of individuals from the gender minority community, such as the petitioners themselves."<sup>11</sup>

This accords with the UN Independent Expert's analysis that,

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<sup>8</sup> UN General Assembly, Report of the independent expert on sexual orientation and gender identity, Protection against violence and discrimination based on sexual orientation and gender identity, A/73/152, July 12, 2018, <http://www.un.org/en/ga/search/viewdoc.asp?symbol=A/73/152>.

<sup>9</sup> *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD), translated in NAT'L JUD. ACAD. L.J., 2008, at 281 ("Legal provisions should be made to provide for gender identity to the people of transgender or third gender, under which female third gender, male third gender and intersexual are grouped, as per the concerned person's self-feeling.").

<sup>10</sup> Yogyakarta Principles, princ. 3.

<sup>11</sup> *Sunil Babu Pant, et. al. v. Office of the Prime Minister and Council of Ministers, et.al.* / Case: Mandamus / 071-WO-0845.



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“[L]ack of legal recognition negates the identity of the concerned persons to such an extent that it provokes what can be described as a fundamental rupture of State obligations. As expressed by one scholar, when States deny legal access to trans identities, what they are actually doing is messaging a sense of what is a proper citizen.”<sup>12</sup>

Maintaining the Nepali legal system’s commitment to self-determination for legal gender recognition is critical. This includes eschewing any attempt to require medical intervention or certification as part of the legal gender recognition process.

The International Covenant on Civil and Political Rights, which Nepal ratified in 1991, provides for equal civil and political rights for all (article 3), the right to recognition for everyone before the law (article 16), and the right to one’s privacy and family (article 17).

Governments are obligated under the ICCPR to ensure equality before the law and the equal protection of the law of all persons without discrimination on any ground, including sex (article 26). The Human Rights Committee has specifically recommended that governments should guarantee the rights of transgender persons including the right to legal recognition of their gender, and that states should repeal abusive and disproportionate requirements for legal recognition of gender identity.<sup>13</sup>

The Court should explicitly reiterate, in line with its judgment in *Pant v. Nepal* (2007), that Nepal’s legal gender recognition procedure is based solely on “self-feeling” and no medical intervention or assessment is allowed as part of the process.

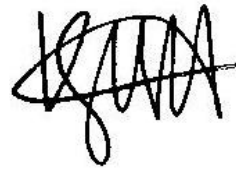
### ***Gender Categories***

In addition to the criteria for gender recognition analyzed above, governments have undertaken various processes for establishing and recognizing gender categories.

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<sup>12</sup> UN General Assembly, Report of the independent expert on sexual orientation and gender identity, Protection against violence and discrimination based on sexual orientation and gender identity, A/73/152, July 12, 2018, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/73/152](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/73/152).

<sup>13</sup> UN Human Rights Committee, “Concluding observations on the fourth periodic report of Ireland,” CCPR/C/IRL/CO/4, August 19, 2014,; UN Human Rights Committee, “Concluding observations on the seventh periodic report of Ukraine,” CCPR/C/UKR/CO/7, August 22, 2013.



Some governments began the process of recognizing the fundamental right of transgender people to be recognized before the law by allowing applicants to be recognized in binary legal genders, namely Male and Female. Then later, those governments added a third gender category.

Three examples of governments that followed this process are: Argentina, Iceland, and the Netherlands. In Argentina, for instance, the legislature passed the 2012 Gender Identity which issues binary LGR on official government documents;<sup>14</sup> in 2021, Argentina's president, Alberto Fernández, issued a decree adding a third gender option for passports.<sup>15</sup> Iceland passed legislation in 2012 which issues binary LGR on official government documents;<sup>16</sup> in 2014, the Icelandic parliament passed legislation which added a third gender option on government documents.<sup>17</sup> The Netherlands passed legislation in 2013 which issues binary LGR on official government documents;<sup>18</sup> in 2021, following a series of court rulings, the Netherlands added a third gender option for passports and birth certificates.<sup>19</sup> Argentina, Iceland, and the Netherlands offer examples of how countries may supplement a pre-existing binary gender LGR model with a third gender option.

Some countries have developed their legal gender recognition procedures in the opposite direction, starting by adding a third gender category and allowing people assigned Male or Female at birth to elect it, then later allowing applicants to be recognized as Male or Female as well.

These countries include India and Pakistan. In India, following a 2014 Supreme Court ruling, the government began listing a third gender option on ration cards, voter identity

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<sup>14</sup> US Library of Congress, "Argentina: New Law on Transgender Rights Approved," May 16, 2012, <https://www.loc.gov/item/global-legal-monitor/2012-05-16/argentina-new-law-on-transgender-rights-approved/>.

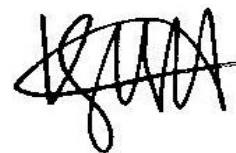
<sup>15</sup> Human Rights Watch, "Argentina Recognizes Non-Binary Identities," July 22, 2021, <https://www.hrw.org/news/2021/07/22/argentina-recognizes-non-binary-identities>.

<sup>16</sup> Alþingi (Parliament). 2012a. Act on the Status of Individuals with Gender Identity Disorder No. 57/2012.

<sup>17</sup> <https://www.althingi.is/thingstorf/thingmalin/atkvaedagreidsla/?nnafnak=57694>. It might also be of interest to note that this law eased requirements for people to change their gender ID.

<sup>18</sup> Human Rights Watch, "Netherlands: Victory for Transgender Rights," December 19, 2013, <https://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights>.

<sup>19</sup> Dutch News, "Court Rules Non-Binary Person Can Be X Without Providing Expert Opinion," December 2012, <https://www.dutchnews.nl/news/2021/12/court-rules-non-binary-person-can-be-x-without-providing-expert-opinion/>.





cards, passports, and bank forms;<sup>20</sup> in 2019, the cabinet of India approved the Transgender Persons (Protection of Rights) Bill granting transgender people a pathway towards Male or Female LGR in addition to a third gender option.<sup>21</sup> In Pakistan, following a 2009 Supreme Court decision,<sup>22</sup> the government began listing a third gender option on the national identity card registry. In 2017, the government began issuing passports with a third gender option as well.<sup>23</sup> In 2018, Pakistan passed the Transgender Persons (Protection of Rights)<sup>24</sup> which grants Pakistanis access to not only a third gender option, but also Male or Female options in accordance with their self-declared gender identity.<sup>25</sup>

India's and Pakistan's approaches to legal gender recognition illuminate how countries may supplement a pre-existing third gender category with Male or Female gender options. Nepal appears to be in the latter category, with this case before the Court offering the opportunity for transgender men to be recognized as Male and for transgender women to be recognized as Female

*Pant v. Nepal* (2007) was one of the world's first examples of a court citing the 2006 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity. Principle 3 of the Yogyakarta Principles—a set of principles developed by international human rights experts and endorsed by the UN—states that:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic

<sup>20</sup> Telegraph India, "State's first transgender passport," April 11, 2017, <https://www.telegraphindia.com/odisha/state-s-first-transgender-passport/cid/1391219>.

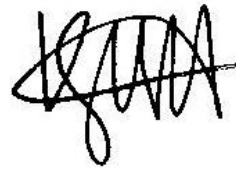
<sup>21</sup> Ministry of Social Justice and Welfare, "The Transgender Persons (Protection of Rights) Bill, 2019," [http://orinam.net/content/wp-content/uploads/2018/12/2018\\_LS\\_Eng.pdf](http://orinam.net/content/wp-content/uploads/2018/12/2018_LS_Eng.pdf).

<sup>22</sup> Supreme Court of Pakistan, *Khaki v. Rawalpindi*, April 11, 2009, <https://www.icj.org/wp-content/uploads/2012/07/Khaki-v.-Rawalpindi-Supreme-Court-of-Pakistan.pdf>.

<sup>23</sup> Dawn, "Pakistan issues first third-gender passport for transgender activist," June 24, 2017, <https://www.dawn.com/news/1341545>.

<sup>24</sup> Ministry of Social Justice and Welfare, "The Transgender Persons (Protection of Rights) Bill, 2019," [http://orinam.net/content/wp-content/uploads/2018/12/2018\\_LS\\_Eng.pdf](http://orinam.net/content/wp-content/uploads/2018/12/2018_LS_Eng.pdf).

<sup>25</sup> Section 3 of the 2018 Transgender Persons Act: "a transgender person shall have a right to be recognized as per his or her self-perceived gender identity."



aspects of self-determination, dignity, and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress, or deny their sexual orientation or gender identity.<sup>26</sup>

In the subsequent 15 years, courts and legislators around the world have increasingly referenced or been inspired by the Yogyakarta Principles in developing legal gender recognition procedures.

In 2016, a group of international experts developed the “Yogyakarta Principles + 10,” a set of principles that explicitly stakes out a progressive expansion of those codified in 2006. Principle 31 states:

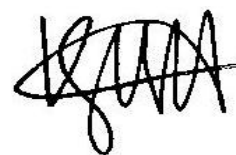
Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.<sup>27</sup>

The continued emphasis by individuals, activists, experts, jurists, and lawmakers around the world on simple, transparent, and accessible legal gender recognition procedures, and the reinvigoration of the Yogyakarta Principles a decade after they were first codified to further emphasize the importance of this issue, offers the Court important guidance to continue Nepal's leadership on this issue.

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<sup>26</sup> “Principle 3,” Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006, <http://yogyakartaprinciples.org/principle-3/>.

<sup>27</sup> The Yogyakarta Principles +10, <https://yogyakartaprinciples.org/principles-en/yp10/>.







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## 2. Relevant publications by Kyle Knight

Knight K., Bochenek M. "Establishing A Third Gender Category in Nepal: Process and Prognosis," *Emory International Law Review*, Vol. 26, Issue 1. 2012.

Knight K., Sollom R. "Making disaster risk reduction and relief programmes LGBTI inclusive: examples from Nepal," *Humanitarian Exchange*, October 2012.

Knight K., Welton-Mitchell C. "Gender identity and disaster response in Nepal," *Forced Migration Review*, April 2013 (co-author).

Knight K., et al. "Surveying Nepal's Sexual and Gender Minorities: An Inclusive Approach," *The Williams Institute*, 2014.

Knight K. "Outliers: Sunil Babu Pant, the Blue Diamond Society, and Queer Organizing in Nepal," *Studies in Nepali History and Society*, Vol. 19, No. 1, 2014.

Knight K., Flores A., Nezhad S. "Surveying Nepal's Third Gender: Development, Implementation, and Analysis," *Transgender Studies Quarterly*, 2015.

Knight K. "Bridges to Justice: Case Study of LGBTI Rights in Nepal," *Astraea Foundation for Justice*, 2015.

Knight K. "How Nepal's Constitution Got Queered," October 14, 2015, *The Los Angeles Review of Books*.

Knight K. "Legal Gender Recognition: Building The Infrastructure For Trans Communities To Thrive," chapter in: *Trans Lives in a Globalizing World: Rights, Identities and Politics*, 2021, Routledge.



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